MICHIGAN

LAW REVIEW

VOL. IX. MAY, 1911 No. 7

THE STATE'S POWER OVER FOREIGN CORPORATIONS.

THIS paper is devoted to a consideration of certain phases of our constitutional law governing the authority of the states over foreign corporations as that authority developed between the end of the fourth decade of the last century and the end of the first decade of this, and as it has been altered by a remarkable group of decisions rendered by the Supreme Court of the United States only about a year ago. The subject is one which concerns the frame of our institutions, for the final view which the Court shall take upon the questions involved in this matter will largely establish the boundaries of State and Federal power in zones which perhaps today it is a euphemism to describe as "twilight" zones. The view ultimately taken by the court will also determine whether any state shall continue to have the power openly to flout the Federal Constitution by imposing capital punishment upon artificial persons on the express ground that they have availed themselves of a constitutionally guaranteed privilege, such a privilege as that of recourse to the Federal Courts.

It is not final results but processes, progress towards results, that are examined. The law of this subject is still in a state of evolution. So he who reads these pages may be warned that he goes a journey without promise of a destination, though, it may be, he will be helped to speculate on what the destination is to be. Some questions have been answered by the Supreme Court's latest decisions on this subject. But others have been raised by them—questions that, as we shall see, at least suggest that we are on the eve of some significant changes in our constitutional outlook.

I. THE POWER OF THE STATE OVER FOREIGN CORPORATIONS TO THE YEAR 1910.

a. *Its general character.*

The foundation in judicial decision of the State's authority over foreign corporations was laid broadly and deeply in 1839 in the case of *Bank of Augusta* v. *Earle*.[1] In this case Chief Justice Taney for the court declared that "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." "But although it must live and have its being in that state only" he said "it does not by any means follow that its existence there will not be recognized in other places. * * * What greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place? * * * Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction express or implied." The authority of this case has until recently never been shaken.[2] Its controlling influence in the development of this branch of our constitutional law is most conspicuously attested in *Paul* v. *Virginia* the decision of which was rested, almost solely, on *Bank of Augusta* v. *Earle*.

The doctrine so broadly enunciated in this pioneer case—that the recognition of a foreign corporation by domestic states and the enforcement of its contracts made therein depends purely upon the comity of those states[3]—has been of such influence that ever since the general principle that a state's authority over foreign corporations not engaged in interstate commerce is complete has been considered incontestible. One or two qualifications have been made necessary but these qualifications, until the last year or two, were never such as seriously to threaten the truly general and fundamental character of this principle.

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[1] 13 Pet. 519.

[2] Thus in Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, the court, by Justice McKenna, said that Bank of Augusta v. Earle "involved the power of the Bank of Augusta, chartered by the State of Georgia, and invested by its charter with a function of dealing in bills of exchange, to exercise that function in the State of Alabama. In passing on the question certain principles were declared which have never since been disturbed." Western Union Tel. Co. v. Kansas, 216 U. S. 1, 52, where Justice Holmes declared that it has been "regarded as unquestionable since Bank of Augusta v. Earle, 13 Pet. 519, that as to foreign corporations seeking to do business wholly within a State, that State is the master, and may prohibit or tax such business as it will."

[3] Paul v. Virginia (1868), 8 Wall. 168, ibid p. 181, where the doctrine of Bank of Augusta v. Earle is well stated.

In *Paul* v. *Virginia*[4] it received the following statement: "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its (the foreign corporation's) contracts upon their assent, it follows as a matter of course, that such assent may be granted upon such terms as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion"[5] No one has stated the principle more strongly than the present Chief Justice of the Supreme Court. In *Hooper* v. *California*[6] Justice White, for the court, declared that "the principle that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state has been long settled,"[7] and further: "The state of California has the power to exclude foreign insurance companies altogether from her territory. * * * She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made, and, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation. * * * The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the constitution of the United States."[8]

The Court said in *Paul* v. *Virginia*, that if the Constitution could be construed "to secure to citizens of each state in other states the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the states."[9]

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[4] Ibid.

[5] In Horn Silver Min. Co. v. New York (1892), 143 U. S. 305, the court, by Justice Field, after quoting the above and more from Paul v. Virginia said: "This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest."

[6] (1895), 155 U. S. 648.

[7] p. 652 and cases cited.

[8] See also the concurring opinion by Justice White in Pullman Co. v. Kansas (1910), 216 U. S. 56, at pp. 63 et seq.; see Crutcher v. Kentucky (1891), 141 U. S. 47, at p. 59.

[9] 8 Wall. 168, 181.

b. *"Unconstitutional conditions" precedent inhibited; "unconstitutional conditions" subsequent sustained.*

The most important qualification[10] that had been placed upon this principle down to the year 1910 resulted from the attempts of certain states to limit the admission of foreign corporations to those that had first agreed to give up their constitutional privilege of access to the Federal Courts. In a number of cases, the most prominent of which are *Barron* v. *Burnside,*[11] and *Southern Pacific Co.* v. *Denton*[12] the Supreme Court declared that a statute requiring a foreign corporation, *as a condition precedent* to its admission to the state, to surrender a right and privilege secured by the Federal constitution and laws was unconstitutional and void and that no effect or validity could be given to any agreement or action of the corporation in obedience to the provisions of such a statute.

Section 1 of the law of Iowa, declared to be unconstitutional in *Barron* v. *Burnside,*[13] provided that the foreign corporation affected by the act should file a resolution, passed by its board of directors, requesting the issuance of a permit to transact business in the state, "Said application to contain a stipulation that said permit shall be subject to each of the provisions of this act." Section 3 contains the provisions forbidding removal to the Federal Courts: "Sec. 3. Any foreign corporation sued or impleaded in any of the courts of this state * * * who shall remove any such cause from such state court into any of the federal courts held or sitting in this state, for the cause that such corporation is a non-resident of this state or a resident of another state than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this state; such forfeiture * * * to date from the date of filing of the application on which such removal is affected."

But the Supreme Court early made it clear that it had no intention of applying this doctrine to anything but conditions precedent.

[10] It has been decided that if a state contracts with a foreign corporation to treat it in the same way that it treats domestic corporations the obligation of the contract is binding. American Smelting Co. v. Colorado, 204 U. S. 103. But this is not in a true sense a qualification of the doctrine above stated, hence is not considered in this connection, though it might well be discussed in a more elaborate treatment of the subject. The same is to be said of the "due process" guaranty of the Constitution. The "equal protection of the laws" guaranty is made most conspicuous in the later cases hence such consideration as it receives is postponed to the latter part of this paper.

[11] (1887), 121 U. S. 186.

[12] (1892), 146 U. S. 202, 207.

[13] The Texas statute which was the subject of the litigation in Southern Pacific Co. v. Denton, 146 U. S. 202, was "to the same effect as the Iowa statute" in the above case. See Security Mut. Ins. Co. v. Prewitt (1906), 202 U. S. 246, 256.

It had not declared war against the imposition of "unconstitutional conditions" by the states. No foreign corporation could agree or be required to agree to such conditions, but once in the state its privilege to remain there could be forfeited by the state in case it sought to bring suit in a Federal Court, to remove a case to a Federal Court, or, as it would seem, to exercise almost any other right[14] secured to it by the Constitution of the United States but whose invocation the state had forbidden. Indeed the court went further. If its express words in *Security Mutual Insurance Company* v. *Prewitt,* are not misunderstood—their meaning seems very plain—a state could enact laws prospectively imposing "unconstitutional conditions" any time before a foreign corporation sought admission to the state, which laws while they could not affect the *admission itself,* might, if properly framed, become operative immediately after the corporation was admitted. Thus the admission of the corporation, while it could not take the form of an agreement to submit to "unconstitutional conditions," could operate automatically upon an already existing law so as to give such "unconstitutional conditions" practically instantaneous effect. The conditions must be subsequent. But they might be prospectively subsequent![15]

The doctrine that a state may impose "unconstitutional conditions" subsequent, to which a foreign corporation must submit if it desires to continue in the state, is old and well established. What the Court said in 1896 in *Security Mutual Insurance Company* v. *Prewitt*[16] it had said about thirty years before in *Doyle* v. *Continental Insurance Company.*[17] In the Doyle case it had been contended that the court in upholding such conditions subsequent indirectly sanctioned what when presented directly it condemned.[18] In the

[14] Unless indeed the State had entered into a contract with the corporation not to subject it to discriminative treatment. See American Smelting Co. v. Colorado, 204 U. S. 103. In their dissent in Security Mutual Ins. Co. v. Prewitt Justices Day and Harlan said: "If the state may make the right [of the foreign corporation] to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all."

[15] It is difficult to believe that the Supreme Court could maintain such a doctrine long. But the repudiation by the court of this doctrine, or of any suggestion that it has ever been held could affect but little the force of the court's holding that "unconstitutional conditions" subsequent—strictly subsequent both in enactment and operation—can be validly imposed.

[16] 202 U. S. 246.

[17] (1876), 94 U. S. 535. See also Insurance Co. v. Morse (1874), 20 Wall. 445, and reference thereto in Security Mut. Ins. Co. v. Prewitt, at p. 251.

[18] The opinion in this case concludes as follows: "It is said that we thus indirectly sanction what we condemn when presented directly; towit, that we enable the State of Wisconsin to enforce an agreement to abstain from Federal Courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable because the complainant

Prewitt decision the same contention was made and the same answer was given, and this notwithstanding the since decided cases of *Barron* v. *Burnside,*[19] *Southern Pacific Company* v. *Denton,*[20] etc. These cases, Justice Peckham, speaking for the court, declared were clearly distinguishable, in that they made the condition precedent.[21] He showed that the statutes in these cases differed fundamentally from those passed upon in the Doyle, Prewitt, and similar cases, in that they were not separable into parts. They required in effect surrender of the privilege of recourse to the Federal Courts as a condition of admission, whereas the statutes in the latter cases dissociated the condition from the admission of the corporation, attaching it wholly as a condition subsequent to such admission.[22]

In his decision in this case Justice Peckham made the following emphatic assertions:

"As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial. * * * It is admitted [by counsel for the insurance companies in their brief] that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a state to enact in advance that if a company remove a case to a Federal Court its license shall be revoked. We think this

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has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice or the wrong that it alleged to exist, must determine the question. No right of the complainant under the laws or the Constitution of the United States by its exclusion from the State is infringed."

[19] 121 U. S. 186.

[20] 146 U. S. 202.

[21] "On the whole it would seem that the decision in Doyle v. Continental Ins. Co. is not affected by the later cases; and that, while a State may not require an agreement not to remove a suit to the Federal Courts, it may enforce a regulation by which a foreign corporation so removing a suit may be for that reason excluded from doing further business in the State." Beale, Foreign Corporations, p. 169.

[22] Justice Peckham quoted from Justice Blatchford who said of the statute in Barron v. Burnside, "The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the Secretary of State, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the State, might not be an unreasonable or objectionable requirement, if standing alone; but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit, and with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal Court." For the provisions of this statute see supra p. ———

distinction is not well founded. * * * No stipulation or agreement being required as a condition for coming into the state and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a Federal Court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the *Doyle* case we think is good."

II. THE DECISIONS OF 1910.

a. *Western Union Telegraph Company* v. *Kansas and Pullman Co.* v. *Kansas.*

Such was the state of the law on this general subject matter until the October term 1909 of the Supreme Court, when the twin cases of *Western Union Telegraph Co.* v. *Kansas*[23] and *Pullman Co.* v. *Kansas*[24] were decided. The decisions in these cases were long and most spirited. Perhaps never unless it be in *Doyle* v. *Continental Insurance Co.* and *Security Mutual Life Insurance Co.* v. *Prewitt,* has the court been more earnestly divided over any question in this general subject matter than it was at this time. These cases deserve close attention for it is a question whether the Supreme Court will not use, indeed whether it has not already used, them as a means of insinuating some striking departures in the law of state authority over foreign corporations.

If the opinions of four of the five judges who determined the disposition of these cases,[25] the opinions written by Justice Harlan, be taken by themselves free from any influence of the concurring opinion of Justice White, it could be contended that they decide noth-

[23] (1910), 216 U. S. 1.

[24] (1910), 216 U. S. 54.

[25] Western Union Tel. Co. v. Kansas was argued March 17 and 18, 1909, decided Jan. 17, 1910. Pullman Co. v. Kansas was argued March 17 and 18, 1909, decided Jan. 31, 1910. Justice Peckham did not take his seat on the bench during the October term 1909. He died Oct. 24, 1909. But he "took part in the consideration of the [Western Union] case and argued with the minority," 216 U. S. 56. Nothing is said as to his participation in the Pullman case, but these two cases are practically identical, They were argued at the same time. It is stated at page iii of 216 U. S. that "Mr. Justice Moody was absent from court on account of illness and did not take his seat during October term 1909, nor did he participate in the decision of any of the cases reported in this volume which were argued or submitted during October term 1909." However, it appears that he did hear the arguments, participate in the decision and approve the opinion in these two cases. See 216 U. S. 48, 63. Justice Lurton took his seat on the bench Jan. 3, 1910. Justice Brewer died March 28, 1910. It would appear from the above that the decision of the court in the Western Union case was by Justices Harlan, Brewer, Day and Moody, with Justice White concurring in a separate opinion, while Justice Holmes, the Chief Justice, and Justices McKenna and Peckham dissented; the decision in the Pullman case was by the same division, except that Justice Peckham's name does not appear. Justice White again gave a separate concurring opinion.

ing new, that they inaugurate no departure, and witness at the most merely the logical extension of what at the present day is well nigh the most vigorously maintained doctrine of our constitutional law, to wit: the doctrine that no state shall be allowed to burden interstate commerce without the consent of Congress.

In few words what these decisions decided was this: that the states may not burden interstate commerce directly or indirectly and that they may not do this even by taxing the distinctly intrastate commerce of a corporation engaged in interstate commerce upon the basis of the corporation's entire capital stock.

In *Western Union Telegraph Co.* v. *Kansas* a statute of Kansas provided that before a corporation of another state, even one engaged in interstate commerce, should have authority to do local business in Kansas, it should pay "to the state treasurer, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent. of its authorized capital, upon the first $100,000 of its capital stock, or any part thereof; and upon the next four hundred thousand dollars or any part thereof, one-twentieth of one per cent; and for each million or major part thereof over and above the sum of five hundred thousand dollars, $200." The Western Union Telegraph Company had a capital stock of $100,000,000. Accordingly the fee demanded of it as a condition of its doing local business in Kansas was $20,100. The facts in *Pullman Co.* v. *Kansas* were substantially the same. In this case the Charter Board of Kansas in making an order permitting the Pullman Company to engage in business in the state, upon payment of the fee, declared at the end of its order: "It is further understood, ordered and provided that nothing herein contained shall apply to nor be construed as restricting in anywise the transaction, by said applicant, of its interstate business; but that this grant of authority and requirement as to payment relate only to the business transacted wholly within the state of Kansas."

In writing the decision of the court in these cases Justice Harlan laid all emphasis upon the fact that the tax though nominally on intrastate commerce was in fact a burden on interstate commerce.[26] He declares this and recurs to it repeatedly. This and nothing else is the centre and substance of both decisions. Everything else is supplementary and incidental to the driving home of this one dominant conclusion.

[26] Of course there would have been no disagreement among the judges in this case if all could have agreed that the tax was in fact a tax on interstate commerce. It has long been settled that great as might be the power of a state over foreign corporations this power could not extend to corporations engaged in interstate commerce. See, for example, Hooper v. California, 155 U. S. 648, 652.

"The disavowal by the state of any purpose to burden interstate commerce, cannot," he says, in the Western Union Case, "conclude the question as to the fact of such a burden being imposed. * * * If

It is submitted that if the purpose of the majority decision be defined with precision and held clearly in mind no conflict will be found with such cases as *Pullman Company* v. *Adams, Osborne* v. *Florida, Allen* v. *Pullman Company* and *Crutcher* v. *Kentucky,* or that at least they can be easily reconciled with this purpose.

In *Pullman Company* v. *Adams*[28] a tax of one hundred dollars "on each sleeping and palace car company carrying passengers from one point to another in the state * * * and twenty-five cents per mile for each mile of railroad track [in the state] over which the company runs its cars" was held constitutional, on the assumption that the companies would be free to abandon the business taxed if they saw fit. "The company attempted by pleas and by an offer of evidence to bring before the court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the state was merely a burden on its commerce between the states, while at the same time, it argued, it was compelled to assume that burden by Sec 195 of the state constitution, which declares sleeping car companies to be common carriers and subject to liability as such." After reciting these facts Justice Holmes, speaking for a unanimous court, said: "If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher* v. *Kentucky,* 141 U. S. 47. On the other hand if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne* v. *Florida.*[29] The Company cannot complain of being taxed for the priv-

ations, in whatever business engaged, from doing business within its limits. On the contrary, this court said in that very case that a state has the right to prohibit all foreign corporations, in whatever business engaged, from doing business within its borders **unless such prohibition is so conditioned as to violate some provision of the Federal Constitution** * * * The court did not intend by its judgment in the Prewitt case to recognize the right of Kentucky, by any regulation as to foreign insurance companies, to burden interstate commerce or to tax property located and used without its limits. It could not have done so without overruling numerous decisions of this court on that subject," 202 U. S. at pp. 46, 47.

[28] (1903), 189 U. S. 420.

[29] In Osborne v. Florida (1897), 164 U. S. 650, 655, Mr. Justice Peckham, speaking for a court in which there was no dissent, said: "It may be here assumed that if the statute applied to the express company in relation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce. * * *

ilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

The decision in *Allen* v. *Pullman Company*[30] was to the same effect. Because the sleeping car company was at liberty to decline its local business, the privilege tax on such local business was held valid. The case affords an excellent illustration on the one hand of the sort of taxation of sleeping car companies which is construed as a burden on interstate commerce and on the other hand of taxation of such companies which is not so construed. The decision in this case, which was again the decision of a unanimous court, was written by Justice Day. In the course of it he said: "It is not necessary to review the numerous cases in this court in which attempts by the states to control or regulate interstate commerce have been the subject of consideration. While they show a zealous care to preserve the exclusive right of Congress to regulate interstate traffic the corresponding right of the state to tax and control the internal business of the state, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness."[31]

In this series of cases the taxation pronounced valid by the Supreme Court was on the intrastate business in basis and fact as well as in name, whereas in the *Western Union* and *Pullman Company* v. *Kansas* cases the tax though in name on intrastate commerce was based upon and measured by all the stock of interstate commerce corporations, which represented and was a primary constituent of the value of all their business everywhere. Take the case of *Allen* v. *Pullman Co.*, and note how careful the court is to distinguish the kinds of taxation of intrastate commerce that will be upheld from the kinds that will not be upheld. The latter are disallowed because they include in effect taxation of interstate commerce. This

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It has never been held, however, that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute." The license tax was sustained in this case "in view of the decision of the Supreme Court that it affected only business of the company within the State." See Allen v. Pullman Co. (1903), 191 U. S. 171, 180.

[30] Cited in preceding note.

[31] Then quoting part of Justice Peckham's words in Osborne v. Florida, reproduced in note 29 supra. It should be observed in passing that in none of these cases—Pullman Company v. Adams, Osborne v. Florida, Allen v. Pullman Company, or Crutcher v. Kentucky—does the Supreme Court expressly or by fair implication either affirm or deny that a state can exclude the intrastate business of a foreign corporation engaged in interstate commerce. And yet this is a class of cases in which, if anywhere, we might reasonably expect to get light upon that point.

distinction, it may be repeated, is characteristic. But this is far from saying that these and other cases are not in conflict with the concurring opinions of Justice White, and perhaps with cases decided since *Western Union* v. *Kansas* and *Pullman Co.* v. *Kansas,* That however is another matter and will be touched upon presently.

The dissent of Justice Holmes, with whom were Chief Justice Fuller and Justice McKenna, in these cases, earnestly as it ignores the interstate commerce principle involved, and vigorously as it points a broad doctrine of states rights, hardly serves to diminish the effect made by the court or Harlan decisions. Those decisions speak one tongue, the dissenting opinions most of the time quite another.[32] "It appears to me ground for regret that the court so soon should abandon its latest decision. *Security Mut. Life Ins. Co.* v. *Prewitt,*" says Justice Holmes. But Justice Harlan and the majority believe that the Prewitt decision has nothing to do with the question before them. "The vital difference between the *Prewitt* case and the one now before us," says Justice Harlan "is that the business of the insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the Telegraph company was primarily and mainly that of interstate commerce." This instance is generally characteristic of the failure of the two sides to agree as to what is the question of disagreement.

But if the concurring opinions of one Justice, Justice White, in these cases were to be taken as their ruling doctrine, if the law and precedent of these cases should be found in what he says rather than in what the judges for whom Justice Harlan spoke say, then there may be little question that these cases do inaugurate departures —of the most striking character—in the law of state authority over foreign corporations.

Justice White expressed his general assent to the views of Justice Harlan and his fellows, but he went beyond them, and stated his own opinions with the utmost emphasis and incisiveness. In

[32] It is only in the latter part of his second dissenting opinion, that in Pullman Company v. Kansas, that Justice Holmes may be said to consider somewhat directly the principle made so prominent in the court or Harlan opinions, and then he dismisses it very shortly. He says: "I am quite unable to believe that an otherwise lawful exclusion from doing business within a state becomes an unlawful or unconstitutional burden on commerce among the states because if it were let in it would help to pay the bills. Such an exclusion is not a burden on the foreign commerce at all, it simply is the denial of a collateral benefit." But even here it cannot be said that he clearly joins issue with the main opposition. He is speaking of exclusion, they of the taxation of interstate commerce. He takes issue rather with the concurring opinion of Justice White. This seems characteristic of both of Justice Holmes' dissenting opinions—something highly suggestive in view of the sequel. For it begins to appear that Justice White's contentions may not impossibly become the doctrine of the court.

the Western Union case he laid down the doctrine that to impose discriminative conditions upon foreign corporations that have come into the state with its express or implied consent is to *confiscate their property*. In the Pullman case he divided foreign corporations into two classes, those over which the state authority is absolute" and those over which it is "relative." The intrastate business of corporations engaged in interstate commerce is within the latter class and, he said, a burden upon such intrastate business may be regarded as a burden on interstate commerce.

To give his own words in the Western Union case: "This cause is concerned not with the power of the state to prevent a corporation from coming in for the purpose of doing local business and to attach conditions to the privilege of so coming in, but involves the right of the state to confiscate the property of the corporation already within the state and which has been there for years, devoted to the doing of local business as the result of the implied invitation or tacit assent of the state arising from its failure to forbid or to regulate the coming in. * * * It is to be observed that the view taken by me does not deprive the state of power to exert its authority over the corporation and its property in the amplest way subject to constitutional limitations. It simply prevents the state from driving out the corporation which is in the state by imposing upon it arbitrary and unconstitutional conditions."

In the Pullman case he maintained the same principle without further discussion, and then unfolded his doctrine regulating the authority of the state over intrastate commerce of a corporation engaged in interstate commerce. "As it is obvious," he says, "that the Pullman Company in so far as it was engaged in interstate commerce within the state of Kansas, was independent of the will of the state, it follows that the state had no absolute power to exclude the corporation, and therefore no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business. The power to exclude in such a case being only relative, affords no warrant for the exertion by the state of an absolute prohibition. That is to say, the exerted power could not in the nature of things be wider than the authority in virtue of which alone it could be called into play. Moreover it seems to me that where the right to do an interstate business exists without regard to the assent of the state, a state law which arbitrarily prevents a corporation from carrying on with its interstate business a local business, would be a direct burden upon interstate commerce and in conflict with the principles stated in proposition I. This follows since the imposition on

a corporation which has a right to do interstate business within the state of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business. It is not by me doubted that as a practical question the arbitrary prohibition against doing a local business imposed on one engaged in and having the right to engage in interstate commerce is to burden that business."

Here, in these two propositions—the proposition that a foreign corporation once admitted to the state or suffered to come in (these terms as used in this opinion being not very definite) without the state's dissent cannot be expelled because it refuses to submit to "unconstitutional conditions;"[33] and the proposition that a state cannot prohibit a corporation engaged in interstate commerce from engaging in intrastate commerce—is perhaps material enough with which to make over the law of state authority over foreign corporations if the court is so disposed. And not only enough to make over that law but enough to make over and materially reduce the state's authority over much of what has heretofore been considered distinctly local and intrastate business.

As we shall see almost at once, the opinions of Justice White in these cases evidently had a powerful influence over the subsequent deliberations of the court. And it is not without great significance that the larger part of the dissent in the Western Union case, and practically all of it in the Pullman case seems to have been leveled not at the conclusions of the majority but at those of Justice White! Was it foreseen even then that the concurring opinion rather than the majority opinion had blazed the way for the new developments so soon to be espoused?[34]

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[33] At least that if it is so expelled it must be compensated for the property loss resulting.

[34] In an article in the Harvard Law Review for April, 1910, Mr. James M. Beck expressed the opinion that the decision of Justice White with that of the court indicated a significant departure. Writing on the topic of "Nullification by Indirection," he said:

"The states also have taken up with destructive effect this doctrine. In some, no insurance company can do business unless it first practically waives its right under the Federal Constitution to sue in the federal courts, and after some indecision the Supreme Court has sustained this form of nullification by indirection. The logic of this is that any state can compel a foreign corporation not engaged in interstate commerce or some other federal activity to waive all its rights under the Federal Constitution if it desires to do business in the state. This results from Paul v. Virginia, easily one of the two most mischievous decisions the Supreme Court ever announced.

"While this article was in preparation, the Supreme Court indicated for the first time in several decades its purpose to modify the doctrine of Paul v. Virginia. Kansas v. Western Union Tel. Co. and the Pullman Palace Car Co., decided during the present term of the court, held that if a state imposes, as a condition precedent to the right of a foreign corporation to do business wholly within the state, a condition that is a burden upon the right of this corporation to engage also in interstate commerce, such condition

b. *Southern Railway Company* v. *Greene* and *Herndon* v. *Chicago R. I. & P. Ry. Co.*

The writer would guard against any exaggeration of the meaning and possible effects of the tendency indicated in the decisions now to be considered. At the same time he would not understate them. These decisions, *Southern Railway Co.* v. *Greene*[35] and *Herndon* v. *Chicago R. I. & P. Ry. Co.*[36] were the direct sequel[37] of the decisions in *Western Union Telegraph Co.* v. *Kansas* and *Pullman Co.* v. *Kansas.*

The first of them, *Southern Railway Co.* v. *Greene,* is direct authority for the principle that a foreign corporation which has once come into the state with the consent of the state, which has done business there, which has acquired a large amount of property in the state, which is subject to taxation by the state and to the jurisdiction of the state courts, is a "person" within the provisions of the Fourteenth Amendment and as such may not be taxed at a higher rate than or in a different way from domestic corporations engaged in the same kind of business. The words of the court are so broad that it is impossible to limit this doctrine to corporations engaged in interstate commerce.

The action in this case was to recover $22,458.36 which the plaintiff claimed was wrongfully exacted from it because the law did not extend to persons or corporations owning the same character of property and carrying on the same kind of business as is owned and carried on by corporations organized under the laws of other states. The act in question provided that no corporation required to pay a tax under this statute should do any business in the state of Alabama not constituting interstate commerce, or maintain or commence any action in any of the courts of the state, upon contracts made in the state other than contracts based upon interstate commerce, unless such corporation should have paid the tax within a time designated.

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is void. * * * Unfortunately, as in so many important cases of recent years, a majority of the court could not join in the same reasoning, for, while five justices united in the judgment, one of them (Mr. Justice White), placed his decision upon narrower grounds. These decisions, however, indicate a significant departure from previous decisions and make it probable that in the future a state cannot so exercise its right as to exclude a foreign corporation from engaging in a business which is non-federal in character except upon conditions which burden the rights of such foreign corporation under the Federal Constitution."

[35] 216 U. S. 400, argued December 16 and 17, 1909, decided February 21, 1910.

[36] 218 U. S. 135, argued April 14, 1910, decided May 31, 1910.

[37] Ludwig v. Western Union Tel. Co., 216 U. S. 146, opinion by Justice Harlan, might be included for some purposes in this group. It is declared to be decided on the grounds of Western Union Tel. Co. v. Kansas and Pullman Co. v. Kansas. However, the facts of the case are such as to make it of minor interest in the present connection.

Justice Day stated the question as follows: "The important Federal question for our determination in this case is: When a corporation[38] of another state has come into the taxing state in compliance with its laws, and therein has acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is it liable to a new and additional franchise tax for the privilege of doing business within the state, which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged?"

The court answers this question by declaring the corporation to be a person in the state of Alabama and as such entitled to the protection of the Fourteenth Amendment. It declares that "one of the provisions of the Fourteenth Amendment * * * binding upon every state of the Federal Union prevents any state from denying to any person or persons within its jurisdiction the equal protection of the laws. If this statute as it is interpreted and sought to be enforced in the state of Alabama, deprives the plaintiff of the equal protection of the laws it cannot stand. The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation. That a corporation is a person within the meaning of the Fourteenth Amendment is no longer open to discussion. This point was decided in *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181, 188 wherein the court declared: 'The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included.' And see *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, and cases cited on p. 154."

The doctrine that a foreign corporation entering a state may become a person within its jurisdiction had never before been made so broad.[39] It should not be said that the doctrine as stated in

[38] Note that the statement is broad enough to include all foreign corporations, that it is not restricted to corporations engaged in interstate commerce.

[39] The attorneys for the defendants in error in this case readily admitted it to be "undoubtedly true that appellants are persons within the jurisdiction of the State, within the meaning of the Fourteenth Amendment, and as such are entitled to the equal pro-

this and the Herndon case is novel. But it would seem impossible to assert that it is not a rather striking extension of principles previously held.

The crux of the question however is not what makes a foreign corporation a person but what makes it *a person within the jurisdiction* of the state. Thus in *Blake* v. *McClung* the court said that the provision of the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws "manifestly relates only to the denial by the state of equal protection to persons 'within its jurisdiction.' Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction,' while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument."[40]

The action in *Herndon* v. *Chicago, R. I .& P. Ry. Co.,* was brought to enjoin certain provisions of the acts of the state of Missouri, as violative of complainant's rights under the Federal Constitution. Among these provisions was one requiring railroad companies to stop passenger trains at the junction or intersecting points of other railroads. It was held that the railroad already having provided adequate accommodations at the points in question, the regulation was an unreasonable burden on interstate commerce and void under the commerce clause of the Federal Constitution. Another provision, that with which we are particularly concerned here, prohibited the bringing of suits in the Federal Courts by foreign corporations engaged in intrastate commerce. The complainant averred that, acting under the authority of this provision, the secretary of state had threatened to and, unless enjoined, would cancel its certificate of the right to do business in the state of Missouri.[41]

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tection of the law." But they said: "It is not a denial of the equal protection of the law to impose on a foreign corporation a tax for the privilege of doing business in the taxing state, when no such tax or a tax of a different amount, is imposed on domestic corporations engaged in the same business." And see cases cited to this contention. 216 U. S. 410.

[40] (1898), 172 U. S. 239, 260.

[41] Section 1 of the act in question was as follows: "If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other State, Territory or Country, and doing business as a carrier of freight or passengers from one point in this State, to another point in this State, under the laws of this State, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any such corporation to enter or to do business in this State, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this

This latter question was disposed of in three abrupt but most significant paragraphs. The court, speaking by Justice Day, said: "As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the state of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal Courts, or remove one from the State Courts to the Federal Courts, but little need be said. This is so because of the cases decided at this term involving contentions kindred to the one made in this case See *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.,* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Southern Railway Co.* v. *Greene,* 216 U. S. 400.

"Applying the principles announced in those cases, it is evident that the act in controversy cannot stand in view of the provisions of the Constitution of the United States. Moreover, this is not a case where the state has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the state, complying with its laws, and had acquired, under the sanction of the state, a large amount of property within its borders, and thus had become a person within the state within the meaning of the Constitution,[42] and entitled to its protection. Under the statute in controversy a domestic railroad company might bring an action in the Federal Court, or in a proper case remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court, discussing the right of the state to exclude foreign corporations, and to prevent them from removing cases to the Federal Courts, it has been conceded that while the right to do local business within the state may not have

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state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this State to another point in this State shall forthwith be revoked by the secretary of state, and its right to do such business shall cease, and the secretary of state shall publish such revocation in some newspaper of large and general circulation in the State, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this State to another point in this State, or to do business as a carrier of passengers or freight of any kind from one point in this State to another point in this State at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this State to a point without this State, or from a point without this State to a point within this State, or from making what are known as interstate shipments and transportation."

[42] Note that there is nothing in these words to limit the effect of such conditions to foreign corporations engaged in interstate commerce. Would not any foreign corporation standing in the same situation be a person within the jurisdiction of the State?

been derived from the Federal Constitution, the right to resort to the Federal Courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof.[43]

"It is enough now to say that within the principles decided at this term, in the cases cited above, the act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void. We find no error in the decree granted in the Circuit Court, and the same is affirmed."

It is apparent that these two decisions are almost if not quite to the same effect as the concurring opinions of Justice White in *Western Union Telegraph Co.* v. *Kansas* and *Pullman Co.* v. *Kansas.* This similarity is he more significant in that the intervals between the latter and the former decisions were so brief—about a month in the case of *Southern Railway* v. *Greene* and three months in *Herndon* v. *Chicago R. I. & P. Ry. Co.* Because of this fact it is possible that all four cases should be read together, should be considered as of a piece, the decisions in the later cases being regarded as the immediate interpretations, extensions, and possibly emendations of the court or Harlan decisions in the earlier cases.

Another consideration which tends to the same conclusion is found in statements by both Justices Harlan and Day made subsequent to the Kansas cases, in which they seem to adopt a part or all of Justice White's theory that, generally speaking, a foreign corporation that has been admitted to a state and has obtained property there, cannot be excluded, except under conditions which need not be considered here.[44] Here, however, were opportunities for both of these Justices in a measure to effectuate their own views on "unconstitutional conditions" subsequent—views which they had expressed with extraordinary emphasis in their dissent in the Prewitt case[45]—so it may be that these later decisions are not adoptions of the White doctrines so much as they are attempts to apply, so far as possible, the Day-Harlan doctrine of 1906 and the

[43] The syllabus is in the following broad terms: "While the right to do local business within a state may not be derived from the Federal Constitution, the right to resort to Federal courts is one created by that Constitution; and, as against a foreign corporation already established within its borders, a state cannot forfeit the right to do business because of the bringing of an action in the Federal courts, and so held that the act of March 13, 1907, of Missouri, imposing such a penalty is unconstitutional and void as to a foreign corporation already in the State at that time."

[44] For statement by Justice Harlan see Ludwig v. Western Union Tel. Co., 216 U. S. 146, 163; for statements by Justice Day see above excerpts from Southern Railway Co. v. Greene, 216 U. S. 400, and Herndon v. Chicago, R. I. and P. R. Co., 218 U. S. 135.

[45] 202 U S. 246, 258.

Bradley-Swayne-Miller doctrine of 1876.[46] It seems certain that Justices Harlan and Day would agree with Justice White today no better than they did four years ago on the question of a state's power to impose "unconstitutional conditions" subsequent.

c. *Effects of the decisions of 1910.*

The first most important and significant question that now emerges is this: Has this group of decisions, rendered in the winter and spring of 1910, changed the law of state power to discriminate against foreign corporations? Have the states been deprived of any considerable part of that power? No attempt will be made to answer the question definitely. But it should be worth while to indicate how much of a question it is, and in what a changed condition the law of this subject now seems to be.

The second question of first rate importance and significance concerns the Supreme Court's present attitude toward the power of the state to make effective the "unconstitutional condition" subsequent when imposed upon foreign corporations. Have the states been stripped of this power? This question, it is true, is a phase of the first one. Consideration of the first one involves some consideration of it. But the important role that the "unconstitutional condition" subsequent has played in almost the whole course of the development of this subject matter makes it desirable to observe somewhat independently the effect which the decisions of 1910 had upon that strange doctrine.

In the consideration of the first of these questions, the general question concerning the diminution of the state's power, it will conduce to clearness if the matter is examined first with respect to foreign corporations already doing business in the state, second with respect to foreign corporations which may enter the state in the future. First, then, with respect to foreign corporations already in the state. As a result of these new pronouncements, the rule seems perfectly clear that any foreign corporation so far established in a state that it is a person within the jurisdiction of the state cannot be excluded because of its failure to comply with any "unconstitutional condition" or any substantially discriminative condition—a condition the compliance with which would amount to a deprivation

[46] Justice Bradley in Doyle v. Continental Ins. Co. vigorously condemned the idea that any state should have the power to impose "unconstitutional conditions," even though they be conditions subsequent, upon any person or corporation. He said that the practice of imposing such conditions "however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of courts when brought within proper cognizance." 94 U. S. 535, 543.

of the fundamental rights secured to persons by the Federal Constitution—unless the privileges of domestic corporations to exist in such state are terminable on the same grounds.[47] It would seem, in other words, that no state can discriminate in a fundamental way against a foreign corporation that has become a person within the jurisdiction of the state. The only way, it would seem, in which this inference of the effect of the decisions can be overcome is by a direct judicial repudiation of the breadth of language used in *Southern Railway Co.* v. *Greene* and *Herndon* v. *Chicago R. I. & P. Ry. Co.* As has been said the language there used appears broad enough to include *all* foreign corporations that have become persons within the jurisdiction of the state; not foreign corporations engaged in interstate commerce merely. This language seems consciously and deliberately used for the purpose of affecting state power over all foreign corporations that become persons within the jurisdiction of the state.

But when does a foreign corporation become a person within the jurisdiction of the state in contemplation of the Fourteenth Amendment? It is impossible to say definitely.

The decision in *Southern Railway Co.* v. *Greene* would suggest that all or a part of a number of things—such as acquisition of property in the state, payment of taxes on its property and franchises to the state, subjection to the courts of the state, carrying on business in the state for many years under the laws of the state, etc.,[48]—would make such corporation a person within the jurisdiction of the state. *Herndon* v. *Chicago R. I. & P. Ry. Co.* may indicate that merely doing business in the state and acquisition of property there with the consent of the state are enough to make the corporation a person. The court said in that case: "The corporation was within the state, complying with its laws, and had acquired, under the sanction of the state, a large amount of property within its borders, and thus had become a person within the state within the meaning of the Constitution, and entitled to its protection."

It is our inability to say exactly when a foreign corporation will not and when it will become a person within the jurisdiction of the state that makes it impossible to say to how great an extent the authority of the state over foreign corporations already in the state has been affected. But it is submitted that the general effect produced by these cases is that little is required to bring the foreign corporation within the protection of the Fourteenth Amendment,

[47] Quaere: To what extent could a state impose "unconstitutional conditions" upon its own domestic corporations?

[48] 216 U. S. 400, see p. 412.

to make it a person within the jurisdiction of the state.[49] If doing business in the state and acquiring property there with the consent of the state will make it a person within the jurisdiction of the state how much business must be done and how much property must be acquired? Can the Supreme Court fix these matters arbitrarily? If doing business in the state for ten years and acquisition of property amounting to ten million dollars will make a foreign corporation a person within the jurisdiction of the state why will not doing business ten months and acquisition of property amounting to ten thousand dollars make it a person within that jurisdiction? What law or doctrine can be pointed to that would justify the Supreme Court in making a distinction for this purpose between the corporation of large and that of little acquisitions,[50] between that which has done business in the state for a term of years and that which has done business there for a term of months?

It may continue to be held that there are certain circumstances under which a foreign corporation can be said to act in a state without becoming a person within the jurisdiction of the state. Isolated acts, or a series of disconnected acts for the purpose of winding up its business after it has withdrawn from the state,[51] the payment of a license fee for maintaining an office in the state,[52] the maintenance of an office in the state for the purpose of transacting business in the state,[53] carrying on business in the state under a limited license[54] "presenting its claim in the state court and thereby becoming a party to the cause,"[55] no one of these things in and of itself apparently could make the foreign corporation a per-

[49] A note writer in 23 Harv. L. Rev. 549, 550, is of the opinion that "as the law now stands, the compliance with any statutory requirements places the corporation within a foreign jurisdiction, but if it acts under the common law the corporation has not yet left the state of incorporation." This was written after the decision in Southern Railway Co. v. Greene, but before the decision in Herndon v. C. R. I. & P. R. Co. And see Blake v. McClung, 172 U. S. 239, 261, where it is at least implied that merely doing business in the state "under conditions that subjected it to process issuing from the courts" of the state might make the foreign corporation a person within the jurisdiction of the state. The question of what effect the subjection of a foreign corporation to the process of a state's courts has upon the position of the corporation in the state is plainly of much interest and importance in this connection. Many cases bearing on it will be found in a note on "Rights of Non-Residents to Sue Foreign Corporations," 70 L. R. A. 513 et seq.

[50] Such minor acquisitions as property merely for the purpose of maintaining an office in the state may be excluded from consideration in order that no quibble may be raised.

[51] Hunter v. Mut. Reserve Life Ins. Co. (1910), 218 U. S. 573.

[52] Pembina Min. Co. v. Pennsylvania, 125 U. S. 181, 189.

[53] Ibid.

[54] See Security Mut. Life Ins. Co. v. Prewitt, 200 U. S. 446; Southern Railway Co. v. Greene, 216 U. S. 400, 413.

[55] Blake v. McClung, 172 U. S. 239, 261.

son within the jurisdiction of the state, unless the effect of the decisions of 1910 is indeed most revolutionary. But that admitted, the impression is not much altered that these decisions have probably had a decidedly restrictive effect on the power of states over foreign corporations, by markedly limiting those against which it can discriminate.

Second, with respect to a foreign corporation that may enter the state in the future. It will be recalled that as the law stood previous to the decisions of last year a foreign corporation while it might be subjected to "unconstitutional conditions" subsequent could not be compelled to agree to what have been called "unconstitutional conditions" precedent. That is to say, any agreement by it to forego its right of recourse to the Federal Courts or any right of the same category[56] as a condition of its admission to the state was absolutely null and void. *And this without respect to the question whether the foreign corporation admitted to the state was or was not a person within its jurisdiction.*

Have the decisions of 1910 rendered the position of foreign corporations that are on the way to enter a state any weaker than it was? Or have they, perhaps, strengthened it? It is as true today as it has been at any time that no foreign corporation contemplating entrance to a state can be disciplined by the state as a result of any agreement to give up its right of recourse to the Federal Courts that it makes or refuses to make at the time of its admission. There was nothing in the decisions of 1910 to weaken the position of the foreign corporation in this regard. Has that position been strengthened by it? The foreign corporation contemplating entering the state has been partly relieved of at least one bugaboo. Before these decisions it knew that any state might after admitting it attempt, and perhaps lawfully succeed in the attempt, to exclude it in case it had recourse to the Federal Courts or exercised certain other constitutionally guaranteed privileges. Now it has good reason to believe that such an attempt will fail, *provided only* it so enter and establish itself in the state as to become a person within the state's jurisdiction within the meaning of the Fourteenth Amendment. It would seem likely that the only foreign corporations doing business in a state that will not be protected against these "unconstitutional conditions" subsequent will be those that do not take the precaution to become "persons," or are prohibited or prevented from taking such precaution.

It would seem that just so long as the foreign corporation is not a

[56] This category, it must be said, has never been precisely enumerated.

person within the jurisdiction of the state it may be subjected to unequal treatment. Hence at the time of its admission, this being a time before it has become a person within the jurisdiction of the state, it might be subjected to discriminatory treatment, for instance to unequal taxation or to absolute refusal of admission.[57] But once a person within the jurisdiction of the state, would the same kind of treatment subsequently imposed be legal? To what extent, in other words, can the state attach discriminatory conditions, which, to adapt a property law locution, will run with the corporation, and remain as effective and enforceable after the corporation becomes a person within the jurisdiction of the state as they were before it achieved that coveted status of asylum? The question was difficult to answer before the decisions of 1910.[58] Those decisions have added complications. But if, at the best, this question is susceptible of only a speculative answer,[59] it would seem that at least one question bearing on this matter can be answered now. As a result of the latest decisions discriminatory conditions that any state proposes to have run with the foreign corporation must be attached *before* the corporation becomes a person within the jurisdiction of the state. The achievement of the status of personality would seem to terminate all the state's *unimproved* opportunities to impose discriminatory conditions amounting to unequal treatment.

Consideration of the effect of these decisions upon state power over foreign corporations has involved consideration of their effect upon "unconstitutional conditions" subsequent. But a word may be added on this question. As indicated, it seems pretty clear that these conditions can no longer be imposed upon foreign corporations once they have become persons in the state. And as it is perfectly established that "unconstitutional conditions" cannot be exacted as a term of admission to the state it would seem plain that the on-

[57] See Pembina Min. Co. v. Pennsylvania (1888), 125 U. S. 181, in which it was held that the plaintiff in error (foreign corporation) was "not a corporation within the jurisdiction of the state." But "the office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim."

[58] The case of Philadelphia Fire Ass'n v. New York, 119 U. S. 110, was based upon a most suggestive state of facts. See the decision at page 119 especially. Does the court mean by the words "within the state" and "within the jurisdiction of the state," as there used, that the corporation had become a **person** within the jurisdiction of the state, within the provisions of the Fourteenth Amendment, for a stated and at least conditionally terminable period only? Mr. Beale in his work on Foreign Corporations thinks so, judging by the context in which he discusses this case. He also says: "the corporation was within the jurisdiction of New York only for a year; at the end of the year the corporation ceased to have the power to act within the State and therefore to be within the jurisdiction until it complied with this new condition."

[59] An answer which cannot be attempted save upon much more detailed consideration than is possible here.

ly circumstance under which they can now be imposed arises *after* a foreign corporation has entered a state but *before* it has become a person within the jurisdiction of the state. If a foreign corporation or its representatives may enter a state and act there to any substantial extent without becoming a person in the state, then we may see more of these "unconstitutional conditions" subsequent; if by such acts it becomes a person, then the day of the "unconstitutional condition" subsequent may indeed prove to be at an end.

Finally, it seems not entirely improbable that the Supreme Court will hold that no state has a right to exclude for any reason certain kinds of business carried on by foreign corporations over which, until the decisions of last year, it had been contended the states had absolute power. The business referred to is that of intrastate commerce carried on in a state by a corporation engaged in interstate commerce.

It will be remembered that in the case of *Pullman Co.* v. *Kansas* Justice White expressed the opinion that such business could not be excluded. Nor was there anything in the subsequent cases of *Southern Railway Co.* v. *Greene* and *Herndon* v. *Chicago R. I. & P. Ry. Co.* opposing Justice White's doctrine. There was perhaps in these decisions something to favor that doctrine. It is believed by many that sooner or later the Supreme Court must reverse its decision in the Knight or so-called Sugar Trust case[60] and extend interstate commerce to include a vast empire of business not now included,[61] particularly that of manufacturing for interstate commerce.[62] If this should prove true it is apparent to what results the application of this doctrine conceivably may lead. The state's authority over business heretofore considered almost entirely subject to its powers may be tremendously curtailed.

CONCLUSION.

To sum up some of the conclusions of this study:

1. Foreign corporations that have become persons within the jurisdiction of the state—at least those that, previous to attainment of the status of persons within the jurisdiction of the state, were not subjected to continuing conditions—cannot be deprived of any "privilege" guaranteed by the Federal Constitution to which do-

[60] United States v. E. C. Knight Co., 156 U. S. 1.

[61] Indeed it is believed that the effect of the Knight decision has already been seriously limited. See F. J. Goodnow in Political Science Quarterly, Vol. 25, p. 249, et seq., and cases cited. The decisions in some of the lower federal courts have gone even further. At the time of this writing the cases against the Standard Oil Company and the American Tobacco Company had not been decided by the Supreme Court.

[62] But see Crutcher v. Kentucky, 141 U. S. 47, 59.

mestic corporations of the same class are entitled. This involves apparently a direct and material limitation of the hitherto recognized power of the state, for while corporations that had become persons within the jurisdiction of the state could not be denied the equal protection of the laws, prior to 1910 the decisions seemed to indicate that the guaranty of the equal protection of the laws would not prevent the imposition of "unconstitutional conditions" subsequent. The effect of *Southern Railway Co.* v. *Greene* and *Herndon* v. *Chicago R. I. & P. Ry. Co.* on this point it would seem cannot be overcome except by direct reversal, or by violent distinction to show that the decisions were intended to apply only to corporations engaged in interstate commerce or in some other federal activity.

2. Foreign corporations that have become persons within the jurisdiction of the state cannot be deprived of the equal protection of the laws secured by the Fourteenth Amendment.

3. The conditions under which foreign corporations may become persons within the jurisdiction of the state have not yet been either precisely defined or indicated but the recent cases indicate that much less is required to make a corporation a person within the jurisdiction of the state than had been assumed. If this is so the effect of the decisions of 1910 is to emancipate many foreign corporations from the power of the state to impose "unconstitutional" and discriminatory conditions. It may be that practically all foreign corporations now established in any state that have acquired any considerable amount of property there are entitled to substantially the same treatment as that accorded to domestic corporations, unless before they became persons within the jurisdiction of the state they were subjected to continuing conditions, conditions intended to run with the corporation. The extent to which such conditions can be imposed and enforced remains a problem.

4. The effect of the decisions correspondingly reduces the numbers of corporations that can be said to act or do business in the state without being persons within the jurisdiction of the state. The state will act at the peril of its so-called "absolute" power over such corporations in permitting them to comply with various statutes relating to persons or corporations, for little seems now required to transform them from corporate nondescripts to persons within the protection of the Fourteenth Amendment.

5. Opinion will be encountered to the effect that the tendency of the recent decisions is to deprive the state of the power to impose "unconstitutional conditions" subsequent—as distinguished from conditions amounting to unequal treatment under the equal protection of the laws guaranty—even on such foreign corporations as

are not persons within the jurisdiction of the state.[63] But desirable as this would seem, it cannot yet be declared on authority. However, by reason of what might be construed as the court's disapprobation of such "unconstitutional conditions" together with its construction limiting the numbers of foreign corporations not persons within the jurisdiction of the state, the practice of imposing "unconstitutional conditions" may be curtailed almost out of existence.

6. The state still has power to refuse admission to foreign corporations. But this may be subject to marked qualification in the future so far as a certain class of foreign corporations is concerned. If the opinion expressed by Justice White in *Pullman Co.* v. *Kansas* should become the doctrine of the court it would seem that no foreign corporation engaged in interstate commerce can be denied the right to engage in intrastate commerce, whether or not in its capacity as a corporation engaged in intrastate commerce it is a person within the jurisdiction of the state.

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[63] Cf. views expressed by James M. Beck, supra, note 34.